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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

AARON M. SARGENT,
Hobart Building, San Francisco, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

October Term, 1943

No.

Ernest H. Denicke and Mary E. Doble,
Petitioners,

vs.

The Anglo California National Bank of San Francisco (a national banking association), Mortimer Fleishhacker, Herbert Fleishhacker, Mortimer Fleishhacker, Jr., George I. Cochran, Philip S. Baker, R. D. Brigham, Walter E. Buck, Walter A. Haas, Paul E. Hoover, William F. Humphrey, Samuel Kahn, Victor Klinker, William B. Reis, Paul Shoup, Leon Sloss, Jr., Louis Sutter, Alfred B. Swinerton, T. C. Tilden, Joseph O. Tobin, Willard O. Wayman, Irene L. Berg, Executrix of the will of William H. Berg, Deceased, R. Stanley Dollar and Frank Moss,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutlege, Associate Justices of the Supreme Court of the United States:

Petitioners Ernest H. Denicke and Mary E. Doble move this Court for an order directing issuance of a writ to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to compel performance of the duties herein specified, required to complete transcript of record. Statement of reasons is included with each item.

---

1. To Forward Original Documents.

That said Clerk be required to transmit the following to the Clerk of this Court:

(a) Original typewritten Opinion bearing sole signature of Circuit Judge Healy, filed March 1, 1944 (during adjournment of Court) in Appeal No. 10,329;

(b) Original document evidencing Amendment of CCA Rule III, bearing signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney, filed with said Clerk November 30, 1936;

(c) Original printed form of "Decree" containing blank spaces filled in with typewriter, and filed without signature in said Appeal No. 10,329, on March 1, 1944—during adjournment of Court.

Reasons:

The Opinion and Amendment of CCA Rule III (items (a) and (b)) were duly designated. See R. 2070, item 8; 2074, item 8a. Clerk was required thereby to include certified photostats. He refused. The Opinion was printed without irregular signature clause on last page thereof. (R. 1996 at 2004.) The Amendment of Rule III was omitted altogether.

The Decree (item c) printed at 2004 creates a false impression. There was an unsigned document filed separately before this entry was made.

When these originals are delivered to this Court, petitioners will request that photostat copies thereof be prepared as a supplemental record.

2. **Documents Showing Suppression of Record.**

That said Clerk be required to transmit to the Clerk of this Court certified copies of the following, filed in Appeal No. 10,329:

(a) Praecipe requesting Clerk to furnish certified photostats—filed May 10, 1944;

(b) Motion to enforce right to such copies—filed May 16, 1944;

(c) Affidavit in support of such motion—filed May 16, 1944;

(d) Minute order of May 22, 1944, denying such motion;

(e) Original or certified copy of Reporter's Transcript of Argument on such motion—filed May 24, 1944.

Reasons:

The certiorari petition filed herewith, is based on denial of due process in the Circuit Court. Documents showing suppression of the record have a bearing on that matter.

3. Proof of Facts to Support Docket Entries.

That said Clerk be required to respond under oath, to the interrogatories attached hereto as Exhibit "A", and to then transmit same to the Clerk of this Court; same are propounded to develop facts required to support the following docket entries in Appeal No. 10,329:

(a) Date and circumstances surrounding presentation of Application for Reassignment in Bank;

(b) Date and description of action taken by the Court with respect to such Application.

Reasons:

After an irregular Opinion was filed in the Circuit Court on March 1, 1944, petitioners sought Reassignment in Bank to obtain consideration of such error by other members of the Court. The Transcript shows due application made for that purpose. (R. 2014, 2015.) In the Ninth Circuit, assignment is governed by Rule 4 subs. 1 and 2:

> "The calendars of the court shall be made up by the clerk under the direction of the senior circuit judge subject to the approval of the majority of the judges.
>
> The senior circuit judge after conference with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

The docket contains no entry to show presentation of this application, or action of the court thereon. These facts are material to the Petition for Certiorari.

Where the Clerk fails to make an entry, the proper course is to ascertain the fact and to then require him to make a record.

4. Instruction to Make Docket Entries.

That said Clerk be required to make entries in the Docket in Appeal No. 10,329, disclosing the facts mentioned in items (a) and (b) of paragraph 3 hereof; and that upon such entries being made—said Clerk be instructed to furnish certified copies thereof to the Clerk of this Court.

Reasons:

Upon such entries being duly made, same will constitute a part of the record to be transmitted on certiorari.

DOCUMENTS PRESENTED IN SUPPORT OF MOTION.

1. Volume V of Transcript of Record, pages 1955-2077, transmitted to Clerk of this Court on Certiorari.
2. Affidavit filed herewith.

AUTHORITIES IN SUPPORT OF MOTION.

For convenience, statement of reasons has been included opposite each item. The following questions are involved:

1. Right to direct transmittal of originals.

2. Maintenance of a proceeding to establish docket entries where record is incomplete.

28 USCA 863 provides:

> "Upon the appeal of any cause in equity . . . a transcript of the record . . . shall be transmitted to the Supreme Court. Either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

Under Section 262 of the Judicial Code (28 USCA 377), this Court has power to issue all necessary writs:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The certiorari power given by Section 240 of the Judicial Code (28 USCA 347), contains authority to do all acts and things required to make it effective. This includes power to ascertain the truth and to compel the making of an adequate record.

Paramount authority.

This Court is a Constitutional Court with Constitutional powers. Its jurisdiction under Article III, Section 1 includes full authority over "such inferior Courts as the Congress may from time to time ordain and establish.

We seek a writ in such form as may be appropriate to accomplish the purposes expressed herein.

This Court is a Constitutional Court with Constitutional powers. It has authority to make its jurisdiction effective. We seek a writ in proper form to accomplish that purpose.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing motion is well founded in point of law and fact and that the same is not presented for purposes of delay.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

EXHIBIT "A"

In the Supreme Court

OF THE

United States

October Term, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO, et al.,
Respondents.

INTERROGATORIES TO PAUL P. O'BRIEN, CLERK CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

1. You are now Clerk of the United States Circuit Court of Appeals for the Ninth Circuit?

2. In that capacity, you have possession of all files in Appeal No. 10,329, entitled "Ernest H. Denicke et al. v. The Anglo California National Bank of San Francisco et al.", do you not?

3. How long have you held the office of Clerk of said Court?

4. On March 29, 1944, you received and filed in said appeal No. 10,329, the Praecipe which appears at page 2014 of the Transcript filed in this Court; which Praecipe includes the following instruction:

> "You are requested to present the attached Application for Reassignment to the Senior Circuit Judge for action on his part in accordance with CCA Rule 4, subs. 1 and 2."

Was such application presented to said Senior Circuit Judge in accordance with such instruction?

5. If the preceding question is answered in the affirmative, give the date of presentation of such application with statement of what occurred.

6. Did you attend any session or conference of the Court involving discussion or the taking of any action with respect to such application?

7. If so, describe same, and include reference to persons present and action taken thereat.

8. Have you ever been advised as to the action taken by the Court with respect to such Application?

9. If so, give a full statement of all facts within your knowledge bearing upon this matter.

10. Do you have possession or control of any document or memorandum disclosing any action taken by the Court or by any Judge thereof, with respect to such Application for Reassignment?

11. If so, give a brief description of same and include photostatic copies thereof as a part of your answer to this question.

12. The docket entries printed at pages 2061-2062 of the Transcript forwarded to this Court contain no reference to the fact of presentation or to any action taken by the Court with respect to this Application. Give statement of reasons for failure to enter these facts in the docket.

In the Supreme Court
OF THE
United States

October Term, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO, et al.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco.—ss.

AARON M. SARGENT, being first duly sworn, deposes and says:

I am the attorney for Ernest H. Denicke and Mary E. Doble, the petitioners above named; this affidavit is made on their behalf and in support of "Motion to Correct

Diminution and for Enlargement of Record". I am familiar with the documents described in such motion, now a part of the files of the Circuit Court of Appeals for the Ninth Circuit in Appeal No. 10,329.

Original Opinion (Item 1a). This is an original typewritten document containing the following signature clause at page 9 thereof:

"Affirmed.

.....

.....

William Healy,

.....

United States Circuit Judges."

That clause was omitted at page 2004 of the Transcript.

Amendment of CCA Rule III (Item 1b). This is an original document bearing the signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney, filed with the Clerk of the Circuit Court on November 30, 1936. Same was not printed in disregard of designation.

Decree filed during Adjournment (Item 1c). This is a printed form containing spaces filled in with a typewriter, filed by the Clerk of the Circuit Court, on March 1, 1944, during an adjournment. No signatures are affixed thereto. I did not discover that such document existed until receipt of the printed transcript. My attention was directed to the following entry therein at R. 2005 referring to such "Decree", viz.:

"*Filed* and entered March 1, 1944.

Paul P. O'Brien, Clerk."

I then requested leave to examine the *original* of the document so "filed". The Clerk exhibited this unsigned memorandum, made out on a printed form.

It is necessary for this Court to have that document in order to appreciate the irregularity of the entries made in the Circuit Court on March 1, 1944.

Documents showing Suppression of Record. The following documents show conduct in the Circuit Court after preparation of the Transcript to prevent petitioners from obtaining separately certified copies to be used in this Court for enlargement of record, viz.:

Praecipe (Item 2a). This is a written instruction filed with the Clerk of the Circuit Court on May 10, 1944, to obtain separately certified photostatic copies of the Opinion and Amendment of Court Rules above mentioned. It requires the clerk to prepare such copies, or to permit appellants to have such work done. The Clerk refused to comply therewith.

Motion to Obtain Copies (Item 2b). This document was filed May 16, 1944, to obtain an order requiring the Clerk to furnish copies of the documents designated. A true copy thereof is attached hereto as Exhibit 1.

Affidavit in Support of Motion (Item 2c). This was filed May 16, 1944. It shows refusal of the Clerk to furnish copies and that such action on his part was based on an ex parte order by Circuit Judges Mathews, Stephens and Healy, dated April 14, 1944. (R. 2066.)

Order Denying Motion (Item 2d). This entry was made May 22, 1944. It shows refusal of the Circuit Court to permit petitioners to obtain true certified copies of documents bearing on their rights in this case.

Reporter's Transcript of May 22, 1944 (Item 2e). This shows refusal of the Circuit Court to permit petitioners to argue a motion brought for the purpose of obtaining copies of such documents. It discloses that Circuit Judges Mathews, Stephens and Healy sat to act on such motion and that Circuit Judge Mathews made the following statement from the bench:

> "We have here a so-called motion to obtain certified photostatic copies of designated records, in the case of Denicke and Doble against The Anglo California National Bank, No. 10,329. We have examined this so-called motion. We find that it is simply a request to the Court that the Court require the clerk to do that which we have told him not to do. *We won't entertain this motion. The motion is denied.*
>
> Mr. Sargent. I ask for my constitutional right to argue the motion.
>
> Judge Mathews. Motion denied. Court will be adjourned.
>
> Mr. Sargent. I renew my request for my constitutional right to argue the motion.
>
> Judge Mathews. You have no such right as that. *The Court will be adjourned.*"

Docket Entries Concerning Application for Reassignment in Bank (Items 3, 4 and Interrogatories Exhibit "A"). The records of the Circuit Court do not disclose whether the clerk presented the application at R. 2015, or

whether he failed to present same. It is impossible to discover therefrom whether the Court acted or failed to act, or whether such application received consideration from any member of the Court. The interrogatories attached to petitioners' motion as Exhibit "A" are necessary to determine those facts. There is no other way to make that information available to this Court.

EFFORTS TO OBTAIN RELIEF BEFORE MOTION FOR ENLARGEMENT.

Petitioners have exhausted every remedy available to them in the Circuit Court. They filed designations to place material documents before this Court (R. 2070, Item 8; R. 2074, Item 8a).

Circuit Judges Mathews, Stephens and Healy made an order in petitioners' absence excluding such documents from the transcript (R. 2066).

The clerk was then requested to certify these documents separately. He refused.

A motion was filed to obtain copies thereof. Petitioners were denied the right to argue that motion. Said motion was denied. There is no further process which can be employed in the Circuit Court. It is necessary to apply to this Court for issuance of a writ in the exercise of its appellate jurisdiction.

AARON M. SARGENT.

Subscribed and sworn to before me this 7th day of June, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 15, 1946.

(Exhibit Follows.)

EXHIBIT No. 1

No. 10,329

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE and MARY E. DOBLE,
Appellants,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK Moss,
Appellees.

MOTION TO ENFORCE RIGHT TO OBTAIN CERTIFIED PHOTOSTATIC COPIES OF DESIGNATED RECORDS.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants Ernest H. Denicke and Mary E. Doble each move this Court for an order instructing the Clerk to perform the following duties in accordance with request duly made herein, viz.:

1. To prepare and furnish a certified photostatic copy of the whole of the original typewritten opinion filed herein by Circuit Judge Healy on March 1, 1944—including signature clause with two blank signature lines at page nine thereof, also wrapper attached to such document;

2. To permit appellants to take photographic negatives of the whole of said document at the Clerk's office, while said document is in the custody of the Clerk;

3. To certify a photographic copy of said document after preparation of the same by appellants in the manner specified in Item 2 hereof;

4. To prepare and furnish a certified photostatic copy of the original document evidencing amendment of Rule III of the Rules of Practice of this Court filed by the Clerk on November 30, 1936, and bearing signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney;

5. To permit appellants to take a photographic negative of said document at the Clerk's office while said document is in the custody of the Clerk;

6. To certify a photographic copy of said document after preparation of the same by appellants in the manner specified in Item 5 hereof;

7. To advise appellants as to the amount of all fees and other costs required by the Clerk for the performance of each of the duties specified under each of the foregoing items—and to accept payment thereof upon lawful tender being made.

GROUNDS IN SUPPORT OF MOTION.

1. These documents are public records.

2. Any citizen is entitled to examine them, copy them, and have them copied and certified.

3. Appellants have additional standing by virtue of their status as parties.

4. This right of examination includes the right to take photographic copies in the clerk's office, in his presence.

5. Judicial Code Sec. 124 (28 USCA 221), requires the clerk of this Court to copy and certify any document which the clerk of the Supreme Court would furnish on request.

6. 28 USCA, Sec. 543 and the fee schedule promulgated thereunder by the Supreme Court of the United States on March 15, 1941, establishes the right to obtain the relief sought herein. The following provisions thereof determine the fees which are applicable:

"Entering any rule, or making or copying any record or other paper, for each one hundred words .....$ .20

"Every search of the records of the court and certifying the same $1.00

"Affixing a certificate and a seal to any paper.$1.00

"Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)....$1.00".

7. Judicial Code, Sec. 240 (28 USCA, 347) which grants the right to prosecute certiorari herein, secures the right to obtain separate certification of any document requested by counsel for use in connection therewith.

8. 28 USCA, Sec. 863, requires the clerk to furnish separately certified copies of any documents not included in full in his transcript to the Supreme Court on certiorari.

9. This Court is not entitled to infringe these rights. The ex parte order signed by Circuit Judges Mathews, Stephens and Healy, and filed by the clerk on April 14, 1944, does not relieve the clerk, or this Court, of the duty to furnish appellants with the items requested.

10. Said ex parte order of April 14, 1944, does not apply to the application now made.

FACTS SUPPORTING MOTION.

Request for the relief sought by this motion was duly made by a praecipe filed herein on May 10, 1944. Compliance therewith was verbally requested on May 10, 11

and 12, 1944. On the date last mentioned, said clerk refused to furnish the documents mentioned. These facts are shown by the affidavit filed herewith.

POINTS AND AUTHORITIES.

The statement of grounds sustaining this motion contains citation of the statutes and authorities relied upon.

In presenting this motion appellants will refer to the affidavit served herewith, and to their praecipe filed herein on May 10, 1944.

Dated, San Francisco,
May 15, 1944.

AARON M. SARGENT,
Attorney for Appellants.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 155

Office - Supreme Court, U.
JUL 28 1945
CHARLES ELMORE

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF OF RESPONDENTS, R. STANLEY DOLLAR, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAURICE E. HARRISON,
111 Sutter Street, San Francisco 4, California,
Attorney for Respondent, R. Stanley Dollar.

THEO. J. ROCHE,
Mills Tower, San Francisco 4, California,
Attorney for Respondents, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

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Of Counsel for Respondent, R. Stanley Dollar.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Mills Building, San Francisco 4, California,
Of Counsel for Respondents, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

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In the Supreme Court
OF THE
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OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF OF RESPONDENTS, R. STANLEY DOLLAR, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT.

The respondents on whose behalf this brief is filed do not concede that they were properly named as appellees in the Circuit Court or as respondents herein. The real parties in interest are the petitioners on the one hand and respondent, The Anglo California National Bank of San Francisco, on the other. This brief is presented in the hope that it will aid the Court in understanding the questions involved in this petition.

STATEMENT OF THE CASE.

The statement contained in the petition for writ of certiorari and in the brief in support thereof is confusing and to some extent inaccurate. The controlling facts are stated in an opinion of the Circuit Court (141 F. (2d) 285; R. 1996-2004). We restate them now with some amplification and with appropriate reference to the record.

This is a minority stockholder's derivative suit brought on November 7, 1938, for the purpose of enforcing alleged claims in favor of The Anglo California National Bank of San Francisco (hereinafter referred to as the bank) against certain directors of the corporation.* The term "defendants" will be for convenience hereinafter used as referring to these individuals against whom liability is asserted (although the bank is joined as a nominal defendant). The minority stockholder, who commenced the suit, will be hereinafter referred to as the plaintiff. He

*Other defendants were joined, as to whom plaintiff applied for leave to dismiss on June 15, 1942 (R. 442).

was the owner of but 6.08 hundredths of 1% of the outstanding shares of the bank.

On July 1, 1941, the bank filed a petition for termination of the suit and approval of an offer of compromise under which the defendants were to pay it the sum of $350,000 in settlement of the claims involved in this suit and also of the claims involved in another suit pending in the District Court, as well as certain other claims against the defendants (R. 239). Objections to this petition were filed by plaintiff (R. 262) and by Mary E. Doble, another stockholder and the other appellant herein (R. 282). Lengthy hearings upon the petition were held before Judge St. Sure and Judge Roche (R. 989-1844). On January 27, 1942, an order was made denying the petition, without prejudice to the filing by said bank, if so advised, of separate offers of compromise in each of the actions (R. 288-289). On March 19, 1942, the bank filed a second petition for termination* alleging that an offer had been made to terminate the action by payment to the bank of the sum of $200,000 and that the bank had determined that such offer should be accepted. The offer thus reported (as distinguished from the earlier one reported on July 1, 1941) had no reference to any litigation or claims except those involved in this suit. The petition prayed that after notice to the stockholders of the bank a hearing be had and that the bank be authorized to accept the offer and dismiss the action with prejudice (R. 314-326). An order was thereupon made setting the petition for hearing and directing that notice be given to the stockholders (R. 329-330). In response to this notice plaintiff filed objections to the petition on

*Referred to herein as "the petitioner".

March 26, 1942 (R. 332-339). Objections to the petition were also filed on March 28, 1942, by appellant Mary E. Doble (R. 340-344).

The petition came on regularly for hearing before the District Court on March 31, 1942, Mr. Aaron M. Sargent, attorney for plaintiff, appearing in opposition to the petition. By stipulation paragraphs I to V, inclusive, of the petition were admitted (R. 1845).* It was further stipulated that all of the record on the earlier petition, including the proceedings thereunder and the testimony taken in connection therewith, should be considered as being in evidence for the purpose of the second petition (R. 1846). The Court then proceeded to hear testimony, Mr. Sargent participating in the proceedings on behalf of plaintiff and his co-petitioner herein. At the close of the testimony, Mr. Sargent requested that the proof taken on the petition be considered a part of the trial of the case in the event the petition was denied. Thereupon the following proceedings took place:

> "Mr. Sargent. I would ask for an order of consolidation, so that the proof will be considered a part of the trial and part of the settlement of the petition at the same time. There is certainly no need of doing the job twice.
>
> The Court. I do not think the hearing you have had on the offer of compromise, the testimony of that hearing should be considered part of the trial.
>
> Mr. Sargent. Not at this time, but we have here a matter which is for adjudication.
>
> The Court. How do you mean, after this matter now before the Court?

*With the exception of a legal conclusion in Paragraph I.

Mr. Sargent. No, I am moving at this time in the nature of a nonsuit for your Honor to deny the petition, and I wish to reserve the right to introduce evidence in rebuttal at a later date.

The Court. I do not want to hear any further evidence on it. I would prefer to have it understood that it is being submitted on the evidence adduced. I do not want to hear additional evidence on this offer.

Mr. Sargent. In that case, I will submit the matter on the showing made, and on the arguments I have made, and on the briefs already on file.

The Court. That is what I understood was to be done.

Mr. Williams. That is satisfactory to us." (R. 1887-1888.)

After further discussion between Mr. Williams, counsel for the bank, and the Court, the following proceedings took place:

"Mr. Williams. We are willing to submit the matter upon the record now before the Court.

The Court. I suppose that would include the briefs filed.

Mr. Williams. Yes, and any argument which we have made.

Mr. Sargent. I have only one other statement to make, as between me and the bank and its representatives there has been no discussion of any character as to compensation, personally to me or my client, a total lack of discussion and agreement. I give that on my word as an attorney practicing in the Federal Court.

The Court. You mean since the last hearing?

Mr. Sargent. There has never at any time been any discussion. I am content to accept, when this case is decided, such allowance as is proper on the merits of the case, and the damage cases referred to in the

last hearing which are being prosecuted separately. That statement I have already given upon the record.

We submit it.

The Court. Very well, I will continue this matter until the 21st of April." (R. 1889-1890.)

It is quite clear from the foregoing that both counsel and the Court considered that the testimony had been closed and the petition submitted for decision.

On June 29, 1942, the District Court handed down an opinion discussing the facts at length and granting the petition (R. 440-457). On July 2, 1942, a judgment was signed and filed authorizing the acceptance of the offer of compromise and the dismissal of the action on payment of the sum of $200,000 (R. 457-461). On the same day, July 2, 1942, a dismissal with prejudice was filed by the bank's attorney (R. 461-462) and an order was made by the Court reciting the payment of the money and the filing of the dismissal and adjudging that the action was dismissed with prejudice (R. 462-463).

After the entry of judgment plaintiff filed motions to vacate the judgments and orders of June 29, 1942 and July 2, 1942 (R. 468), for leave to file a third amended complaint (R. 532), to cross-examine certain witnesses (R. 573) and to take depositions (R. 580). These motions came on for hearing on August 17, 1942 and were on that day denied. The Court also granted the motions of certain defendants to quash the proceedings to take certain proposed depositions (R. 737-739).

The appeal to the Circuit Court of Appeals was taken from the orders of June 29, 1942 and July 2, 1942, authorizing the compromise, granting the petition for termination

of the action and dismissing the action with prejudice, and also from the order of August 17, 1942, denying the motion to vacate judgment and for other relief, and granting the motions to quash (R. 746-747).

On March 1, 1944, the opinion of the Circuit Court of Appeals affirming the orders was filed (R. 1996-2004) and an order was entered that a decree be filed and recorded in the Minutes of the Court in accordance with the opinion (R. 1995-1996).

Thereafter petitioners moved to vacate the judgment of the Circuit Court of Appeals on the ground that the opinion filed had not been signed by two of the three judges before whom the appeal was heard (R. 2005-2010). This motion came on for hearing on April 3, 1944, before Circuit Judge Mathews and Circuit Judge Healy, at which time Judge Mathews announced that "the opinion was unanimous. The clerk's action was in accordance with the direction of the Court, all three of the judges being in accord, and his action is still in accord with the court's view" (R. 2058), and the motion for an order vacating the judgment was denied (R. 2060).

Petitioners filed in the Circuit Court a petition for a rehearing by the Court in bank (R. 2017-2056) which was denied on April 7, 1944 (R. 2061).

THE QUESTIONS PRESENTED BY PETITIONERS.

In spite of the prolixity of the petition, it is somewhat difficult to define the precise points upon which petitioners rely. So far as we can ascertain they are all comprised within the following questions:

1. Has a District Court the power, in a minority stockholder's derivative suit, after hearing all objections, to approve a compromise of the controversy between a corporation and the persons against whom the claim is asserted, even though the nominal plaintiff opposes the compromise? This is a pure question of law.

2. In this case did the nominal plaintiff have an opportunity to be heard in opposition to the compromise and to offer evidence in support of his objections thereto? This is a pure question of fact.

3. Should the judgment of the District Court be reversed on the ground that it violated Rule 52(a) of the Rules of Civil Procedure by failing to make findings?

4. Is the judgment of the Circuit Court of Appeals invalidated because the opinion was not signed by a majority of the Circuit Judges participating?

I. IN A MINORITY STOCKHOLDER'S DERIVATIVE SUIT THE COURT HAS POWER, AFTER HEARING, TO APPROVE A COMPROMISE MADE BY THE CORPORATION EVEN THOUGH THE NOMINAL PLAINTIFF OBJECTS THERETO.

The petition asserts the claim that "a stockholder with status to sue, has, as a corollary, the right to manage and control the litigation. He has the right to prevent a dismissal" (Petition, p. 12). Petitioners thus apparently take the position that the mere accidental circumstance that the plaintiff, as a minority stockholder, has brought this derivative suit, precludes the Court from considering and approving a compromise of the claim as between the corporation on whose behalf he sues and the persons against

whom the claim is asserted. In other words, petitioners say that the plaintiff can act as a dog in the manger and, at his whim or caprice, block a settlement which the Court, after full hearing, concludes to be in the interest of the corporation.

No better illustration could be found of the opportunities given a minority stockholder to act as a "dog in the manger" by the rule contended for than is disclosed by the record in the present case. It appears that while the bank had under discussion with Mr. Sargent, plaintiff's attorney, a suggestion that a payment of $500,000 (R. 1088) be made to compromise this suit and another minority stockholder's suit, Mr. Sargent on January 23, 1941 wrote a letter to the president of the bank demanding fees and expenses in the sum of $210,000 out of the total anticipated recovery of not more than $500,000 and suggested that his demand for these enormous fees be concealed from the Court (R. 1089-1099; see comment in trial Court's opinion at R. 454-456).* It is not surprising that the trial judge in his opinion stated that "the actions of Mr. Sargent in relation to a settlement of the litigation and the securing for himself of attorney's fees and expenses were without the knowledge and sanction of the Court" (R. 456).

The claim that a minority stockholder who happens to be a nominal plaintiff suing for the corporation can pre-

*Later on May 21, 1941, Mr. Sargent had under discussion an offer to pay $400,000 to settle not only the two minority stockholders' suits but also a personal claim of Denicke which later became the subject of a suit by him dismissed for lack of jurisdiction and now on appeal (No. 10,347 in this Court). In this discussion Mr. Sargent agreed to the proposed settlement "provided that his fees were properly taken care of" and added that his statement could not be used in any Court proceeding (R. 1171).

vent the Court from considering and approving a compromise is not only shocking to elementary principles of justice, but it is opposed to well-established principles governing derivative suits.

Whitten v. Dabney, 171 Cal. 620.

Because the nominal plaintiff in a derivative suit occupies the position thus described, it is universally held that he cannot dismiss the suit, nor enter into a compromise with the actual defendants, unless the approval of the Court is obtained.

Spellacy v. Superior Court, 23 Cal. App. (2d) 142.

And where, after the filing of a derivative suit by a minority stockholder, the corporation (which although nominally a defendant is the real plaintiff) appears, the Court has power to approve a compromise of the claim without the assent of the original plaintiff.

Fratessa v. Superior Court, 125 Cal. App. 372;

Loeb v. Berman, 217 Cal. 716.

It has even been held that where the Court, after hearing, approves a compromise, the nominal plaintiff has no right to appeal from the order approving the compromise, because his personal interests are not affected.

Russell v. Weyand, 5 Cal. App. (2d) 259.

The control of the Court over any dismissal or compromise of a derivative suit is recognized by Rule 23(c) of the Federal Rules of Civil Procedure, declaring that "a class action shall not be dismissed or compromised without the approval of the Court" and providing for a notice to members of the class.

And the federal decisions recognize the inherent power of the Court to control and approve or disapprove any compromise of claims sought to be made.

Seaman v. McCulloch, 8 Fed. (2d) 820;
In re New England Company, 9 Fed. (2d) 344.

The reasoning and controlling effect of these authorities, so we submit, is unanswerable. The District Court in the present instance had full power to approve or disapprove the proposed compromise. Plaintiff could not, by interposing his individual veto, deprive the Court of this inherent power.

None of the authorities cited in the petitioners' brief sustain their position. It is submitted that on this point the decision of the Circuit Court of Appeals is unassailable.

II. PETITIONERS HAD A FULL HEARING IN OPPOSITION TO THE COMPROMISE.

The claim is scattered through the petition for certiorari and the brief in support thereof that the order of the District Court approving the compromise was made before the hearing had been concluded and that the petitioners were deprived of the opportunity to be heard on the petition. The claim is so fantastic and over-technical, in view of the record of what occurred, that it is best disposed of by a few references to the transcript itself. We have already pointed out that, after due notice to all the stockholders, a hearing was held on March 31, 1942, at which Mr. Sargent appeared on behalf of plaintiff and, after admitting certain allegations of the petition (R. 1845,

1846), stipulated that all of the testimony taken on the earlier petition should be considered in evidence (R. 1846) and participated in the taking of supplementary evidence with respect to the second petition (R. 1846-1882). Mr. Sargent thereupon argued in opposition to the petition (R. 1883-1887). He requested that the proof taken on the hearing be considered upon the trial, which motion was denied by the Court (R. 1887). He then stated that he was "moving * * * in the nature of a nonsuit * * * to deny the petition" and that he wished "to reserve the right to introduce evidence in rebuttal at a later date", to which the Court replied that it did not wish to hear any further evidence but would prefer to have it submitted on the evidence adduced. Mr. Sargent thereupon stated:

> "In that case, I will submit the matter on the showing made, and on the arguments I have made, and on the briefs already on file"

to which the Court replied:

> "That is what I understood was to be done."

And counsel for the bank thereupon stated:

> "That is satisfactory to us." (R. 1888.)

Counsel for the bank stated his willingness to submit the matter on the record including briefs filed and arguments made (R. 1890) and Mr. Sargent concluded by saying:

> "We submit it." (R. 1890.)

It is quite apparent from all the discussion of the parties that what was being submitted was not merely Mr. Sargent's motion to deny the petition, but the petition itself. The fact that for the Court's convenience the case

was carried on the calendar from time to time is utterly immaterial.

The plain fact is that plaintiff and his copetitioner for certiorari were given the most ample opportunity to adduce any evidence which they had in opposition to the petition. The earlier petition, filed July 1, 1941, had been opposed by the same attorney for the same clients. The circumstances affecting the exercise of the Court's discretion were inquired into at great length before the two district judges. The testimony taken on this earlier hearing, pro and con, occupies almost 1000 pages of the present record. On this hearing the attorney for the objecting parties was given the opportunity to cross-examine the witnesses and introduce such testimony as he desired. He took full advantage of this opportunity. Thereafter the attorney for the objecting parties argued and briefed the merits of the first petition at length. The second petition (the one which was granted) came before one of the judges who had presided at the hearing on the first petition. He had, of course, heard all of the evidence and considered all the arguments made at the earlier hearing. Needless repetition of this testimony was avoided by a stipulation of the parties that it might be deemed to be adduced on the second hearing. The questions involved were the same, except as to the amount of the offer and the fact that the second petition involved a settlement of only a part of the claim covered by the earlier offer. In view of this situation and the full opportunity given counsel for appellants to participate in the supplementary oral hearing of the second petition, it passes belief how it can be seriously contended that there was not full opportunity for a hear-

ing on the objections. The opinion of the trial judge shows that consideration was given to all of the objections urged (R. 440-457). If ever objecting parties were given the utmost latitude in presenting evidence and argument in support of their objections, these petitioners for certiorari were.

The Circuit Court of Appeals, after reviewing the proceedings properly concluded that "we see in all this no sufficient reason for believing that appellants were deprived of their day in Court".

III. THERE WAS NO VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 52 WITH RESPECT TO FINDINGS.

The claim that Rule 52 was violated by failure to make findings of fact is wholly without merit. In the first place, Rule 52 applies only to a judgment entered after trial, and does not by its terms apply to a hearing on a petition such as the one here involved. But, entirely aside from this point, and assuming that Rule 52 does apply here, it was fully complied with. The Court specifically found in its judgment that "all of said objections are without merit" and that "it is for the best interests of the defendant Anglo Bank and its shareholders that the above-entitled action be dismissed with prejudice upon said Anglo Bank's receiving the sum of $200,000 in lawful money of the United States" (R. 459, 460). These were the only issues presented to the Court upon the hearing. But over and above these findings the District Court delivered an opinion (R. 440-457) in which it reviewed all of the facts in detail and passed upon every controverted question of fact

which had been presented to it. Counsel for appellants does not point to a single issue which is not disposed of in this opinion; and it would be impossible for him to do so.

If the opinion of the trial Court disposes of the controlling issues of fact, it is wholly immaterial that the Court's views are not also expressed in a paper which is specifically labeled as being "Findings of Fact". In *Hazeltine Corporation v. General Motors Corporation* (C.C.A. 3rd, 1942), 141 F. (2d) 34, the Court said:

> " 'The failure of the trial judge to comply literally with the provisions of Rule 52a, although it has been characterized as a "dereliction of duty," is not always a ground for reversal and remand with instructions to make specific findings as required by the Rule. The latter course of action has been adopted where there was an inadequate statement of facts upon vital issues and where such factual issues were not resolved. If, however, the opinion of the trial judge afforded a "clear understanding of the basis of the decision below" and resolved the major factual disputes, the mere formal requirement of separation of findings of fact and conclusions of law has been held not sufficient to necessitate a reversal.' "

IV. THERE IS NO MERIT IN THE CLAIM THAT THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS INVALIDATED FOR FAILURE TO SIGN THE OPINION.

Much space is devoted in the petition for certiorari and the supporting brief to the objection that the opinion which was filed in the Circuit Court of Appeals on March 1, 1944, carried the signature of only one of the three

judges who heard the case. The record shows that on this day the clerk entered an order that a decree be filed and recorded in the minutes of the Court in accordance with the opinion in question (R. 1995-1996). Apparently the point relied upon is that there was a failure to conform to Rule III of the Circuit Court of Appeals with respect to the machinery for informing the clerk of the Court's decision. This point is so obviously tenuous and technical as to deserve little discussion. It would seem clear that the Court should be and was free to adopt any appropriate method of informing its ministerial officer of a decision reached. But this point need not be labored, because the record shows that, on April 3, 1944, upon the hearing of the motion to vacate the judgment, while the Court was in session with two of the judges (Judge Mathews and Judge Healy) present who had participated in the previous hearing, the Court announced that the "clerk's action was in accordance with the direction of the Court, all three of the judges being in accord, and his action is still in accord with the Court's view" (R. 2058). If there had been any irregularity or informality about the previous action of the Court (which we deny), this announcement constituted in itself an act of the Court ratifying the ministerial act of the clerk, and operated as an affirmance of the orders appealed from. The case of petitioners is indeed a poor one when reliance must be placed on a point such as this.

It is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
July 24, 1944.

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